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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CYNTHIA MARIE JACKSON,

Defendant and Appellant.

E034909

(Super.Ct.No. RIF092516)

OPINION

APPEAL from the Superior Court of Riverside County. Vilia G. Sherman, Judge.  
Affirmed with directions.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez, Supervising Deputy Attorney General, David Delgado-Rucci and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Cynthia Marie Jackson of first degree murder (Pen. Code, § 187, subd. (a)), assault of a child causing death (Pen. Code, § 273ab), four counts of felony child endangerment (Pen. Code, § 273a, subd. (a)), and three counts of misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)). She was sentenced to prison for 25 years to life, plus 8 years 8 months. She appeals, claiming the trial court erred in denying her *Wheeler/Batson*<sup>1</sup> motion, the evidence was insufficient to support the verdict of murder by torture or instructions on that theory of murder, the evidence was insufficient to support the verdict of misdemeanor child endangerment as charged in count 5, and the imposition of an upper term and consecutive terms violated *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403]. We reject her contentions and affirm, while correcting an error in her determinate abstract of judgment.

## FACTS

Jackson was the foster mother of eight very young boys, whom she abused, resulting in the death of one. Further facts will be discussed as they are relevant to the issues.

## ISSUES AND DISCUSSION

### 1. Jackson's *Wheeler/Batson* Motion

After the prosecutor used peremptories to excuse two African-American and four Hispanic prospective jurors, the defense brought a challenge under *Wheeler, supra*, 22

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<sup>1</sup> *People v. Wheeler (Wheeler)* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*).

Cal.3d 258 and *Batson*, *supra*, 476 U.S. 79. The trial court concluded that a prima facie showing had been made as to three of the four Hispanic prospective jurors.<sup>2</sup> As to the two African-American prospective jurors, the trial court said, “. . . I think maybe they had some issues, but they were very, very minor, and I think in an abundance of caution, I’m going to ask [the prosecutor] to put on the record [his] justifications for th[em] as well.”

The prosecutor stated that one of the African-American prospective jurors, E-A., said that she might hold him to a standard of proof higher than reasonable doubt, and she might even hold him to a standard of absolute certainty. He said that the other African-American prospective juror, S., said that she would hold him to a higher standard and she said she would want to be certain. Defense counsel countered that all S. said was that she wanted to hear from Jackson and she agreed with the trial court when it instructed her that the law did not require Jackson to testify. The trial court initially said, “What gives me . . . pause is . . . S. I think she was simply voicing the very natural tendency of any juror to want to hear both sides of the story. [Jackson] is an African-American woman, and I think both of th[e African-American prospective jurors whose excusal is being challenged] probably would have been very good jurors.” The trial court then told the prosecutor, “I don’t think your representation that they would hold you to a higher standard holds water.” The prosecutor asked the trial court to read the record. He

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<sup>2</sup> It did not conclude that a prima facie showing had been made as to Prospective Juror V-C.

insisted that S. said she would hold him to a higher standard and that was why he excused her, not because she said she wanted to hear from Jackson or because of her race or gender. The trial court then appeared to have a change of heart, saying, “. . . I can see why [the prosecutor] would think that. I think the fact that I disagree with [him] and the fact that she said she would follow the instruction [that Jackson was not required to testify] is neither here, nor there. I do think [the prosecutor’s reason for excusing her is] race neutral . . . . [¶] . . . [¶] . . . I’m going to find that [his reasons for excusing both African-American prospective jurors are] race-neutral . . . in the prosecutor’s mind. . . . There is another African-American [prospective] juror on the jury at the moment, a female. . . .”<sup>3</sup>

Jackson here asserts that the trial court failed to determine whether the prosecutor’s stated reasons were race neutral and whether the stated reasons were the actual reasons the prosecutor had for excusing the prospective jurors. We disagree.

As the reiteration of the record above discloses, contrary to Jackson’s assertion, the trial court did, indeed, determine that the prosecutor’s reason for excusing S. was race neutral. Additionally, the stated reason was supported by the record. The context of S.’s statement was as follows: The prosecutor noted that another prospective juror, who eventually ended up on the jury, had said that no one can be certain about anything unless the person was there and actually witnessed the event. He asked this juror whether she

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<sup>3</sup> The trial court later said, “I personally felt that [these prospective jurors] would have been good prosecution jurors . . . , but I do think [the prosecutor’s] reasons for  
*[footnote continued on next page]*

understood that she was never going to have absolute certainty in a criminal case, and that was the meaning of what she said. She responded affirmatively. The prosecutor asked S. what she thought of what this juror had said. S. replied, “[W]e know for sure that there’s death, so I’m absolutely certain about that. We’re absolutely sure that there’s misconduct, because we wouldn’t be here.<sup>[4]</sup> But the evidence has to show that to prove with evidence that what caused the death and the misconduct. [Sic.]” The prosecutor reiterated that the law did not require the People to prove the crime to an absolute certainty, that beyond a reasonable doubt, which was a lesser standard, was sufficient. He asked S. if she was comfortable with that standard. She replied, “*Not necessarily*, just because I feel that the accused doesn’t have to say anything, you know. I would like to hear from the accused. I mean, *if I have to listen to small witnesses, I would like to hear from the adult.*” (Italics added.)<sup>5</sup> The prosecutor then reminded S. that Jackson had an absolute right not to testify, which she said she understood, although she twice reasserted that she would like to hear from the defendant. Later, the trial court told S. that it was not

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excusing th[em] were adequately race-neutral.”

<sup>4</sup> Contrary to the assertion in Jackson’s opening brief, this comment did not mean that S. had “presumed guilt to a certain extent.” All it meant was that there was one dead child and seven injured children in a household, so some misconduct probably had to have occurred. It was not a comment on *Jackson’s* liability for the death/injuries.

<sup>5</sup> S.’s desire to have Jackson testify, while seemingly adequately dealt with by the prosecutor and the trial court, does not detract from her statement that she was not necessarily comfortable with the beyond a reasonable doubt standard. Therefore, Jackson’s criticism of the trial court for failing to consider, in denying the challenge to S.’s excusal, her assertion that she would not hold against Jackson the latter’s failure to

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uncommon for her to want to hear from the defendant, but she would be instructed that she could not discuss with other jurors Jackson not testifying or allow it to influence her. She said she could follow this instruction.

Although S. did not say, as the prosecutor asserted, that she would want to be absolutely certain of Jackson's guilt before convicting the latter, she did say that she was uncomfortable with the proper standard of proof and her statement about wanting to hear "from the adult" after "hav[ing] to hear" from the "small witnesses" (presumably, some of the victims) suggests, as the People assert, that she may have demanded more of the prosecution than it was required to produce. This supports the prosecutor's assertion that he was excusing her because of her problems with the standard of proof. Whether this was genuinely the prosecutor's reason for excusing her was more for the trial court to determine than this court, as the former was in a better position to do so than we are. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1197 (*Jackson*).) The record supports the prosecutor's stated reason for excusing S. and the trial court was obviously persuaded that this reason was what prompted the prosecutor's use of his peremptory. This conclusion is entitled to great deference because, in our view, there is no reason to believe that the trial court did not engage in "a sincere and reasoned effort" to evaluate the credibility of the prosecutor's nondiscriminatory justifications. (*Ibid.*)

The prosecutor had asked E-A. whether she felt like she might need 100 percent certainty in order to convict. She responded, "That's a, you know, little gray area in

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testify is unfounded.

there, so I don't -- *I may*." (Italics added.) She repeated that she may. Later, the trial court reread the reasonable doubt instruction and asked E-A. if she could follow it. She said she could. Jackson here asserts that under *People v. Turner* (1986) 42 Cal.3d 711 (*Turner*), the trial court was required to believe E-A.'s later assertion that she could follow the reasonable doubt instruction and disregard her initial assertions that she might require a greater degree of proof. We disagree.

In *Turner*, the prosecutor's reason for excusing a prospective juror was that she was a mother. She had initially said in response to "highly formalized, conceptually complex, and relentlessly repetitive" (*Turner, supra*, 42 Cal.3d at p. 723) questions about her attitude toward the death penalty, "'I'd be too emotionally [*sic*] as a mother.'" (*Id.* at p. 727.) However, later, she told the trial court that she could listen to the evidence and the instructions and attempt to reach a just verdict based on both. The California Supreme Court found that her initial answer had been "much more ambiguous" than what the prosecutor asserted it had been. The Supreme Court continued, "[W]e will never know what the remark actually signified. In light of [her] statement that she could indeed serve as a juror, she may have meant only that she was uncomfortable with the nature of the case -- a feeling that other jurors naturally expressed as well. [Fn. omitted.] At the very least, the remark called for a few follow-up questions that would have soon clarified the matter. Rather than asking such questions, however, the prosecutor immediately removed the last Black prospective juror from the box . . . ."<sup>[6]</sup> In these circumstances we

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have little confidence in the good faith of his proffered explanation.”<sup>7</sup> (*Turner, supra*, 42 Cal.3d at p. 727.) The court added that the prosecutor’s failure to engage this prospective juror in further questioning to clarify her attitude was a factor supportive of a finding of impermissible group bias and it noted that Caucasian prospective jurors who had children had not been peremptorily challenged by the prosecutor. (*Id.* at p. 727 & fn. 15) In contrast to the prospective juror’s statement in *Turner*, E-A.’s twice asserted remark was not ambiguous and did not need clarification. While other jurors were stating their acceptance of the reasonable doubt standard and their rejection of any requirement that the People prove its case to a certainty, she was asserting otherwise.

As noted before, the trial court did not conclude that a prima facie showing had been made as to Hispanic prospective juror, V-C. However, the prosecutor stated his reason for excusing him thusly, “[U]pon questioning[, he] indicated that he would want to have an absolute certainty. He was going to hold me to a higher standard.” Defense counsel below did not contradict this assertion and the trial court ruled that it was race neutral and adequate. The prosecutor had asked V-C., “[I]f I prove my case to you beyond a reasonable doubt, the standard, you’re going to vote guilty?” V-C. replied, “I would also weigh in the fact of the defense presentation.” The prosecutor said, “Okay.

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<sup>6</sup> The defendant was an African-American on parole. (*Turner, supra*, 42 Cal.3d at p. 715.) The victims were Caucasians who were prominent in the community. (*Ibid.*)

<sup>7</sup> We note that since *Turner* was decided, the California Supreme Court has not been as eager to reassess the prosecutor’s good faith. (See, e.g., *Jackson, supra*, 13 Cal.4th at p. 1197.)

But if I prove my case to you beyond a reasonable doubt, which means that I've met all the elements, you have to vote guilty." V-C. responded, "I would." He said he understood that. A short time later, the trial court said the following to V-C., "[Y]ou just said something that gave me a slight pause. You say you would weigh in what the defense presented. I explained to you earlier that the defense doesn't have a job to do here, other than to show up, and all they may do is cross-examine a few witnesses and not much else. If that's all they do, is that going to be a problem for you?" V-C. replied, "No, but--" The court then said, "I didn't want to create false expectations." V-C. replied, "No. What I meant to say is sometimes the things that are said say a lot. The things that are not said say a lot." The court said, "Do you feel like you want the defendant to testify?" V-C. replied, "No, not necessarily."

Although as Jackson here points out, the prosecutor was incorrect in his assertion that V-C. said that he would want absolute certainty, the trial court's conclusion that the prosecutor's reason for excusing him was race neutral and adequate is supported by the record. We agree with the People's interpretation of V-C.'s statement that "things that are not said say a lot" suggests that he might base his verdict on matters not presented at trial.

The prosecutor told the trial court that he had excused Hispanic Prospective Juror Go., for whom the trial court made a finding that a prima facie case had been made, because Go.'s brother-in-law was "going through a statutory rape prosecution" at the same courthouse and the prosecutor feared the former might be biased against the police and or prosecutor's office. Again, this assertion went uncontested by the defense below

and the trial court found that the prosecutor had stated a race-neutral and adequate reason for excusing Go. Go. had said that while his brother-in-law's trial had not yet begun, the latter had a hearing the following week. He said he was close to his brother-in-law and saw the latter on holidays and weekends. He stated that, thus far, he believed his brother-in-law had been treated fairly. He said he did not think he was going to sympathize with Jackson because of his brother-in-law's prosecution. The trial court told Go. he'd be instructed to put aside sympathy and not make a judgment based on it. Go. said he was capable of voting guilty if the prosecution proved one or more charges beyond a reasonable doubt. He also said he was not going to look at the prosecutor "differently" because of his brother-in-law's case. Jackson asserts that Go.'s assurances that he could be fair despite the prosecution of his brother-in-law meant that the record does not support the prosecutor's reason for excusing this juror. We disagree. The record supports the fact that Go.'s brother-in-law, with whom the prospective juror was close and whom he saw weekly, was being prosecuted for a serious crime by the same office that was prosecuting Jackson. At any point during trial, Go. may have perceived that the prosecutor or the police were not being fair to his brother-in-law. Jackson cites no case holding that a prosecutor may not exercise his peremptory challenge because the potential for such bias exists.

The prosecutor told the trial court that he peremptorily excused Hispanic Prospective Juror Gu. because the latter had been falsely accused by Child Protective Services (CPS) and many witnesses from CPS were anticipated to testify at the instant trial. The prosecutor feared that Gu. would be prejudiced against them. The defense did

not contest these assertions and the trial court found them to constitute an adequate and race-neutral reason for excusing Gu. Gu. had stated that 15 years previously, he had been called at home by CPS and told that he had been accused of hitting his 14-year-old daughter with a four-by-four. He said that his daughter had denied telling CPS that he had hit her. He told the person who had phoned him from CPS that he did not know what they were talking about (although he conceded that his daughter had gone to school with a bruise), and a CPS worker came to his home. He reported that they had a long talk, he denied injuring his daughter, and that was the end of the matter. He also said that a friend of his, with whom he had grown up and who had baptized his son, had been accused 15 years ago of touching one of his nieces. His friend “went through all the investigating” and he assumed that the prosecutor did not file charges, adding, “[s]omething was wrong with the investigation.” He said that six months ago, this same friend got accused of touching the prior victim’s daughter, but he did not know what was going on with that case. He said his experience “twice with apparently false accusations” would not make him sympathize with Jackson and what had happened would not influence him.

Jackson asserts that the trial court’s finding that the prosecutor’s reason for excusing Gu. is not supported by substantial evidence. We disagree. As with Prospective Juror Go., the prosecutor was entitled to use his peremptory challenge to remove a juror he feared might be biased against some of the witnesses at trial, or might become biased during the course of trial, depending on what happened to his friend. Ironically, just after Gu. expressed his ability to be fair despite what had happened to him and his friend, Prospective Juror S. reported that her daughter had had an experience

similar to Gu.'s in which the former was falsely accused of abusing her child. It would not have taken much for Gu. to have reacted to this information by forming a negative attitude about CPS. Certainly, the potential for such a reaction provided an adequate and race-neutral reason for this use of his peremptory.

As to Hispanic Prospective Juror M., the prosecutor said that he had excused him because the former had a hard time relating to other jurors. He added that M. took a very long time answering the prosecutor's question about the standard of proof. M. said he disagreed with the person who became a juror mentioned above. When the prosecutor clarified for M. what this juror had said, the former appeared not to understand. The trial court said, "I have something of a problem with [the excusal of] . . . M. . . . because [the prosecutor] spent probably more than 50 percent of [his] voir dire . . . indoctrinating the jurors about reasonable doubt. And the reason I read the instruction after [the prosecutor's] first attempt [to explain the standard] was because I thought [he was] simply confusing them and muddying the water. . . . [¶] And I disagree with [the prosecutor] about . . . M., however, it's a race neutral reason, and I think if that's how [he] felt about him, it's probably adequate. I also note that there are a number of other Hispanic [prospective] jurors, so I don't think you were excusing him for racially-biased reasons." The following day, the prosecutor elaborated upon his reasons for excusing M. He said that when he had asked M. if the latter agreed with the person who became a juror, M. had said that he did not, and he believed there could be certainty. However, this was not his main reason for excusing him. He felt that M. did not understand the law and what the former was saying. "Most importantly," he added, when he again questioned M.

about what the above mentioned juror had said, M. looked expressionless at the juror and took a long time answering the prosecutor's question. The prosecutor said, "[M]y feeling was almost like he was bothered by being called on." The court concluded otherwise, that, to it, this showed that M. was being thoughtful. The prosecutor then added that M.'s shirt was unbuttoned quite low and he "took him to be maybe something of a macho man, and that's the reason why I didn't want him on the jury. I don't want someone on the jury that is not going to fit in with the other jurors that I was trying to pick. [¶] . . . [¶] [H]e wasn't all that sharp, smart, which also made my concerns about him being something of a macho man." The trial court responded, "I was very concerned about [the excusal] of . . . M., because he seemed to me to be a dynamite prosecution juror. I . . . have a strong feeling that if [the prosecutor] hadn't excused him, [defense counsel] would have. [¶] I personally feel that he was an ideal prosecution juror. I think he looked over at [the juror] and I think he was being thoughtful, and essentially what he was communicating was that, ["Y]eah, you didn't have to be there [to be sufficiently certain in order to convict], that you could weigh and listen to the evidence, and that you could come up with a decision." [¶] But I do think that your reasons are essentially race-neutral. . . . [¶] [W]e have a large number of Hispanics [in the jury pool]. . . . Hispanics are no longer a minority in this community, so it's hard to . . . exercise . . . peremptory challenges without excusing Hispanics. We are heavily Hispanic in this area, maybe even a majority, and we have a number of Hispanics left in the jury. So I think that militates in the prosecution's favor. [¶] I did have misgivings about [the prosecutor's] choices, especially [M.], who I think would have made an ideal prosecution juror and I

think gave adequate explanations. [¶] . . . [However,] I'm satisfied at this point."

We agree with Jackson that the cold record before us does not support the prosecutor's assertion that M. disagreed with the juror. As to the prosecutor's assertions that M. did not relate well to other jurors, that he took a long time answering the prosecutor's questions about the standard of proof, that he appeared not to understand the prosecutor's explanation of what the juror said, that he appeared to be bothered because he had been called upon, and that he appeared to be a macho man are matters that are not within the power of this court to assess, as they cannot be determined from the record before us. The record does not support the prosecutor's conclusion that M. was not terribly smart, but, as with the others, matters not clear on the printed page may have influenced the former's view. What is apparent on the record is that the trial court carefully considered the stated reasons and determined that they were genuine, despite its apparently serious misgivings about the wisdom of the prosecutor's getting rid of this "pro-prosecution" juror. Thus, we cannot agree with Jackson that the trial court did not fulfill its duty in this regard.

## *2. Insufficient Evidence of Torture Murder*

In March 1999, the victim of count 8 sustained a very painful spiral fracture of his femur, the strongest bone in the body, which is difficult to break. Such a fracture is caused by twisting the bone. Jackson waited one day to get treatment, claiming the child showed no signs of pain or distress. However, a child abuse expert testified for the prosecution that being able to prudently delay treatment would be unlikely due to the amount of pain and debilitation caused by the fracture. According to this victim's

brother, who is the victim of count 7, the injury was caused when Jackson pushed this victim down the stairs.

Around the same time, Jackson reported small bumps on the back of the head of the victim of count 9, who was about two years old. Two months later, it was noted that this victim was not progressing physically as he should, he did not look well, he was more frail than he had been previously, he had injuries on his head and face, dark circles under his eyes, and missing hair. He was removed from Jackson's home when his social worker concluded that he was being abused and neglected.

That same year, the victim of count 7 appeared very thin and unhealthy. He was sad and frightened, saying Jackson got mad at him more than her husband did.

In early 2000, the approximately three-year-old victim of count 6 had a deep bruise on his thigh. Jackson claimed that this victim had fallen off the pool ladder in her backyard. Six to eight weeks later, this victim suffered a broken arm. Jackson appeared to be indifferent to the child's injury and did not report it to the authorities as required. She claimed it occurred when the child, once again, fell off the pool ladder in her backyard. This victim, on the other hand, told his stepmother that Jackson had grabbed his arm and thrown him down. When a social worker pointed out to Jackson that she was at least negligent in allowing this victim to be injured twice in the same way, Jackson made excuses for her failings. This victim appeared to be very afraid of Jackson and scared to speak while in her presence. On one occasion, he limped in her presence, was told by her to stop, and resumed limping again once he was away from her. He was removed from her home by authorities.

In April 2000, it was noted that the three-year-old victim of count 4 had lost three pounds, had bald spots, and sunken eyes. His brother, the four-year-old victim of count 3, had bruises on his arms and had stopped talking. In May or June 2000, he had red marks on his ear, which Jackson attributed to his hitting his head on the slide in the park. He had three fractured ribs and he screamed in pain when picked up. The prosecution's child abuse expert opined that it was very rare for a child, such as this victim, to accidentally fracture his ribs. Rather, she stated, most such fractures are inflicted, being caused by squeezing the child. This victim also had a bruise on his hip near his pelvis and had sunken eyes. At the same time, his brother had bruises on his cheeks and jaw.

In late June, the victim of count 5, who was 18 to 24 months old, had a bruise under his eye. Jackson said he had fallen while riding his tricycle on the cement patio.

On July 19, 2000, the victim of count 3 was dehydrated, lethargic, pale, gaunt, emaciated, and smaller in stature than he should have been. His brother was also shorter than he should have been, gaunt, and emaciated. There was no food or unspoiled milk or juices in the home.

The prosecution's child abuse expert testified that a child the age of these victims, who has bruising along his jaw and on his cheek, who is emaciated, lethargic, and has hair missing is probably battered. She reported that toddlers rarely bruise each other.

The murder victim had died, at the latest, between 11:45 a.m. and 1:45 p.m. on July 19, 2000. He had bruises on his right forehead, perhaps also on the left, and on his face in front of his left ear and behind his right ear. He had contusions on his left cheek, left chin, and right cheek. He had very dense abrasions on the right side of his nose and

abrasions on both sides of his upper lip. He had an abrasion on the right side of his chin, and a laceration underneath his lower lip caused by blunt force. He had a laceration inside the inner part of his lower lip. He had sustained moderate to severe blunt impact to the right top of his head and to the left back of it. His brain was very swollen due to blunt impacts. The pathologist who performed the autopsy opined that it would have taken hours to one or two days after injury for the brain to swell to the extent it had. The injuries to this victim's head and face had been caused by between 6 or 7 and 13 to 15 different impacts that occurred from over 2 hours to 48 hours before death. The victim had an abrasion near the nipple of his left breast, caused by blunt injury. He had a one-inch tear in his stomach from front impact to the abdomen by significant force. Liquid from the stomach had spilled out of the tear and into the abdominal cavity, causing peritonitis. It had taken between a number of hours to a day before death for this to occur. It was a significant contributor to his demise. The pathologist opined that the injury to the stomach had occurred about one day before death, it would have hurt immensely when it occurred and the peritonitis resulting from it would have caused discomfort and incapacitation. This victim had bruises on his butt, back and neck. The latter two occurred between more than several hours before death to 48 hours before. He had a healing fracture of the right tenth rib, which had occurred 10 to 14 days before death. It had probably been caused by squeezing, and not from falling on a surface. The pathologist opined that the injuries to the trunk of this victim had been caused by two different blows to the front of his body and between two and five to his back. The victim had contusions and abrasions on his left forearm and hand. He had clustered bruises on

his left knee, a bruise on his right knee, and bruises and abrasions on his left shin near his ankle, which had been caused by moderate force. The pathologist opined that the injuries to this victim's arms and legs had been caused by two to three blows, administered between less than several hours to 48 hours before death. The victim had no fat on his body. His muscles were wasting and he had acetone in his blood due to malnutrition. There was no food in his stomach. The pathologist opined that hunger would have been at work in this victim. The cause of death was fatal child abuse syndrome, i.e., this victim's heart went into arrhythmia from the physical and emotional stress of his injuries and neglect over time. The pathologist opined that the victim's other injuries would have caused pain and suffering.

Jackson here claims there was insufficient evidence to support the jury's finding that she intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. We disagree.

Jackson cites cases in which the juries' findings of torture murder were reversed by the California Supreme Court. In one, *People v. Steger* (1976) 16 Cal.3d 539, the court concluded that the evidence was insufficient to support torture-murder instructions where the stepmother beat her stepdaughter because she was frustrated by the child's behavior and was attempting to discipline her. Specifically, the court held, "[T]here is not one shred of evidence to support a finding that she" "severely beat her stepchild" "with cold-blooded intent to inflict extreme and prolonged pain. Rather, the evidence . . . paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided, irrational and totally

unjustifiable attempt at discipline; but they were not in a criminal sense wilful, deliberate, or premeditated. [¶] [S]everal distinct ‘explosions of violence’ took place, as an attempt to discipline a child by corporal punishment generally involves beating her whenever she is deemed to misbehave.” (*Id.* at pp. 548-549, fn. omitted.) In contrast to *Steger*, there was no evidence here that Jackson was attempting to discipline the murder victim when she inflicted the injuries or that she exploded in frustration from his behavior. Rather, the evidence of her history of abusing this victim and the others paints a picture of Jackson as one who deliberately injured and starved her foster children, for some sadistic purpose, then allowed them to be in pain before, if at all, seeking medical treatment.

Jackson also relies on *People v. Tubby* (1949) 34 Cal.2d 72, in which the defendant, over a period of several minutes, beat his elderly stepfather severely in various places in and around their home while, according to the defendant, “‘in a drunken stupor and [not] know[ing] what [he] was doing.’” (*Id.* at p. 75.) There had been no “bad blood” or even notable differences of opinion between the two prior to the attack. The defendant denied being mad at the victim at the time of the crime. The court held, “[T]he record is devoid of any explanation of why the defendant might have desired his stepfather to suffer. The only testimony concerning the relationship between the two men was that the deceased and the defendant were on amicable terms prior to the attack. . . . [T]he defendant’s mother . . . stated that the defendant is ‘all right when he isn’t drinking . . . [.]’ . . . An indication that the defendant was in a ‘fighting mood,’ inclined to fight almost anyone and not primarily interested in causing the ultimate victim to suffer, is the fact that he offered to fight the arresting officer and had to be subdued by force. . . .

[T]he unprovoked assault was an act of animal fury produced when inhibitions were removed by alcohol. The record dispels any hypothesis that the primary purpose of the attack was to cause the deceased to suffer.” (*Id.* at pp. 77-78.) Here, in contrast, there was no evidence that Jackson was under the influence of any intoxicant or that her injuries to this victim, done over a period of time far longer than that in *Tubby*, were acts of “animal fury.”

Jackson also cites *People v. Walkey* (1986) 177 Cal.App.3d 268, in which Division One of this court reversed a torture-murder conviction where the victim’s mother’s lover killed the two-year-old victim with a blow to the abdomen that ruptured the latter’s intestines while taking care of him in his mother’s absence. The victim also had life-threatening injuries to his brain from being hit on the back of the head, fresh bruises on his face, and bite marks, one of which the defendant admitted inflicting after the victim bit him. At least two weeks before the victim’s death, someone had hit him so hard in the abdomen that his spleen hemorrhaged, his liver was partially torn and one of his ribs was fractured. The appellate court appeared to assume that the defendant had inflicted these injuries. (*Id.* at p. 276.) Evidence had been presented that the defendant resented having to take care of the victim, had been seen spanking the victim, and had yelled at him when the latter had a toilet-training accident. Division One, quoting the holding in *Steger*, concluded, “[T]he fact [that the victim] was beaten on numerous occasions shows only ‘that several distinct “explosions of violence” took place, as an attempt to discipline a child by corporal punishment . . . .’ [Citation omitted.] [¶] [T]his evidence merely shows the beatings [the defendant] inflicted . . . were ‘a misguided, irrational and totally

unjustifiable attempt at discipline . . . .” (*Id.* at pp. 275-276.) The appellate court went on to point out expert testimony that had been presented at trial that most instances of child abuse are triggered by something the abuser perceives as a stimulus for the abuse, such as prolonged crying, misbehavior or a toilet-training accident by the victim. Division One added, “Such explosive violence on the part of the abusing adult, without more, does not support a torture murder theory.” (*Id.* at p. 276.) For reasons already stated regarding the holding in *Steger*, we conclude that the holding in *Walkey* is equally inapplicable here. Moreover, there was no expert at this trial, nor any other evidence even suggesting that Jackson injured the child because she was attempting to discipline him or reacting to something he had done. Rather, evidence of her abuse of some of her other foster sons suggests that she deliberately hurt the children with no provocation whatsoever.<sup>8</sup>

Interestingly, Jackson cites *People v. Pensinger* (1991) 52 Cal.3d 1210, which upheld a torture-murder conviction, even though the defendant testified that he injured the child to stop her from crying. The *Pensinger* court concluded that the nature of the injuries and the calculated manner in which the defendant isolated the victim from others created a reasonable inference that the defendant intended to inflict pain rather than that he merely exploded with violence at the child. The California Supreme Court said, “This

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<sup>8</sup> Jackson’s assertion that “evidence was presented that [she] might have resented or disliked [her] role in caretaking the children” is completely unsupported by the record and no reference to any such possible evidence is contained in her statement of facts. Rather, Jackson’s husband testified that he and Jackson were going through the process

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is not a case like *Steger* . . . , where there was a history of a child abuse syndrome which gave rise to periodic explosions of violence. The jury rejected a theory of voluntary manslaughter in the heat of passion;<sup>[9]</sup> [the victim's older brother] testified to no rage or cursing during the kidnapping [of the victim and himself by the defendant]. This, along with the long drive out of town to a very isolated spot, the abandonment of [the older brother] and the trip to the obscurely located dump, all show a calculation and lack of emotional upheaval that distinguishes this case from those in which we have seen only an explosion of violence rather than an intent to torture.” (*Id.* at p. 1240.) Jackson seeks to distinguish *Pensinger* on the basis that the injuries here *could have been* inflicted in a violent rage. However, there was no evidence whatsoever that they *were*.

Jackson also contends that the evidence is insufficient to support the jury's finding that she derived pleasure or contentment from inflicting the injuries on the murder victim. However, given the fact that Jackson had inflicted painful injuries on and starved her other foster children over a period of time, and, despite being investigated by CPS multiple times and having some of those children removed from her care, continued on her course of conduct, the jury could reasonably conclude that she derived some pleasure or contentment from her actions. Jackson's assertion that “the evidence demonstrates that the injuries [to the murder victim] were inflicted in various moments of rage,

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of adopting the murder victim at the time he was injured.

<sup>9</sup> No evidence of provocation having been introduced at trial, this jury was not even given a voluntary manslaughter instruction.

occurring during the 24 hour period before [he] died” is belied by the record.

Having concluded that there was substantial evidence to support the jury’s finding of torture murder, we necessarily reject Jackson’s assertion that there was insufficient evidence to support the giving of torture-murder instructions.

### *3. Insufficient Evidence of Misdemeanor Child Abuse*

Jackson contends there was insufficient evidence to support her conviction of misdemeanor child abuse of the victim of count 5. We disagree. As stated before, this 18- to 24-month old had a bruise under his eye, which Jackson asserted had been caused when he fell off his tricycle onto a cement patio. Given what Jackson had deliberately done to her other foster sons, the jury was reasonable in rejecting her often claimed “it was an accident” story and concluding that she deliberately hit the child. The opinion of the child’s social worker that there had been no abuse carries as little weight with us as it apparently did with the jury. In light of what was going on in Jackson’s home, the failure of this witness and other CPS workers to protect these victims is nothing short of remarkable.<sup>10</sup>

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<sup>10</sup> At sentencing the trial court remarked, “. . . I think Child Protective Services -- I don’t know whether they did something about this, but it seems to me we’re going to go on having a dismal parade of [names of the victims in this case] if they don’t pull up their shoes and socks to some degree. [¶] [O]ne witness [from CPS] came in and said she had noticed some of these things going on in the home, she had reported it to her supervisor, and as far as she was concerned, it wasn’t her [responsibility] anymore to do anything further about it. [¶] Until CPS gets their act together and recognizes that it’s everybody’s [responsibility] and everybody’s job, there will be a group of [murder victim’s name]. [¶] . . . I think CPS has to share some of the responsibility [for what happened]. . . . [¶] . . . [¶] [T]he defendant’s depression, possible schizophrenia, and

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#### 4. *Imposition of an Upper Term and Consecutive Terms*

The trial court began the sentencing hearing by observing, “. . . I don’t really see anything mitigated about this [that would justify imposition of the lower terms]. We have eight [victims].” It further concluded that all of the victims were particularly vulnerable. However, it also found that Jackson’s lack of a criminal record, significant depression, hallucinations, and possible schizophrenia were mitigating circumstances. The court found that the aggravating circumstances of count 3 outweighed those in mitigation, additionally finding as an aggravating factor the fact that it was not imposing additional time for the misdemeanor conviction under count 4. The court ran the term for count 6 consecutive to the sentence on count 3, finding the aggravating circumstances outweighed those in mitigation and noting that it was not imposing additional time for the misdemeanor conviction under count 5. It did the same for count 8, noting that it was not imposing additional time for the misdemeanor conviction under count 7 and that the aggravating circumstances outweighed those in mitigation. The court ran the term for count 9 concurrent with the others.

Jackson here contends that the imposition of the upper term on count 3 and consecutive sentences on counts 6 and 8 violated *Blakely v. Washington*, *supra*, 542 U.S. \_\_\_\_ [124 S.Ct. 2531] (*Blakely*), which was decided after sentencing took place. While

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unsuitability for foster care . . . went unrecognized for too long by Child Protective Services . . . .”

We further note that in light of the fact that at the time of this trial CPS had been sued for its handling of the victims of this case, its workers had the motive to minimize

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Jackson asserted below that she should receive the lower term on each count, she made no objection to the imposition of the upper term and consecutive terms on the basis that the jury had not made factual findings supporting those sentencing choices.

While noting the split of authority in the Courts of Appeal of this state over whether a defendant who does not assert *Blakely* error below has waived it, nonetheless, the People assert that Jackson waived her point by failing to assert it at the sentencing hearing. Concluding, *infra*, that no *Blakely* error occurred here, we need not take a position on this issue.

Blakely pled guilty to an offense that carried a ““standard range”” sentence of 49 to 53 months. (*Blakely, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2535].) An “exceptional sentence” of 90 months, which was “above the standard range” (*ibid.*), was imposed by the trial judge upon its finding, as was required by statute, of factors ““other than those which [were] used in computing the standard range sentence for the offense.”” (*Ibid.*) This exceptional sentence was within the 10-year limit imposed by statute on the class of crimes which included the one to which Blakely had pled guilty. (*Ibid.*) Applying the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348], that ““any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”” (*Blakely, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2536]), the Supreme Court concluded that Blakely was entitled to a jury determination of the existence of the factors relied upon to

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the victims’ injuries during their testimony.

impose the exceptional sentence. The Court rejected the State’s contention that the statutory maximum for *Apprendi* purposes was 10 years rather than the upper end of the standard range, i.e., 53 months. (*Id.* at p. \_\_\_\_ [124 S.Ct. at p. 2537].)<sup>11</sup> In this regard, the high court said, “[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] . . . [¶] The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because . . . ‘[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors *other than those* which are used in computing the standard range sentence for the offense[.]’” (*Blakely, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2537], italics added & original.)

In noting the difference between judicial discretion exercised in indeterminate sentencing schemes, which it noted were constitutional (*Blakely, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2540]), and what occurred in *Blakely*, the Court said, “[I]ndeterminate schemes involve judicial factfinding, in that a judge . . . may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence -- and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is

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<sup>11</sup> In fact, *Blakely* noted, “The facts admitted in [Blakely’s] plea, standing alone, supported a maximum sentence of 53 months.” (*Blakely, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2537], italics added & original.)  
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concerned. In a system that says the judge may punish burglary with 10 to 40 years,<sup>[12]</sup> every burglar knows he is risking 40 years in [prison]. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.” (*Id.* at p. \_\_\_\_ [124 S.Ct. at p. 2540], italics original.) In other words, discretionary judicial factfinding that results in an increased sentence is perfectly all right as long as that sentence is within the statutorily prescribed range of punishment for the offense. If it results in a sentence outside that range, the Sixth Amendment is implicated.

Under the State of Washington’s sentencing scheme, much like California’s, in determining what sentence to impose within the standard range, the trial court holds a hearing during which it considers a risk assessment report, presentence reports, victim impact statements, and the defendant’s criminal history, and it hears arguments from both parties, as well as the victim or the victim’s survivor, and an investigative law enforcement officer, which may include factual matters in support of a sentence at any point within the sentencing range. (Wash. Rev. Code, § 9.94A.500(1); *State v. Williams*

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S.Ct. at p. 2534].)

<sup>12</sup> This is quite a substantial range, which is not unheard of in Washington State. (See Wash. Rev. Code §9.94A.510) (References in another opinion and a dissent, in cases since granted review, to Washington’s “‘de minimis’ standard sentencing range” seem at odds with this reality.) We are certain the United States Supreme Court would not endorse a trial judge’s sentencing a defendant to 10 years while another trial judge sentences another defendant, who committed the same crime, to 40, without relying on

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(2000) 103 Wash.App. 231, 238 [11 P.3d 878, 882]; Cal. Pen. Code, § 1170, subd. (b).)

The Washington trial court's discretion is structured, but not eliminated. (Wash. Rev. Code, § 9.94A.110.) Necessarily, then, a Washington trial court's selection of a term within the standard range necessitates factual determinations by the court that may be in addition to the narrow category of "*facts reflected in the jury verdict or admitted by the defendant*" that *Blakely* addressed. (*Blakely, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2537], emphasis in original.) However, *Blakely* did not suggest that there is any constitutional infirmity with this process.<sup>13</sup> It addressed only going beyond the standard range and imposing an exceptional sentence. Thus, its holding should be confined to similar sentences in California, which we call enhancements, rather than to upper terms. *Blakely's* statement, quoted above, that the judicial factfinding that necessarily occurs in the context of indeterminate sentencing is proper reinforces the conclusion that such factfinding is not, in and of itself, unconstitutional. Taking the example *Blakely* offered to explain its position on this issue, also quoted above, and applying it to the case here, Jackson knew she was risking six years (the upper term) in prison for child endangerment of the victim of count 3. Because she did not commit the crime under circumstances that would justify enhancing her sentence (such as being armed), she was entitled to no more

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factors justifying such a disparity in punishment.

<sup>13</sup> In *Apprendi*, the United States Supreme Court observed, "[N]othing . . . suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender--in imposing a judgment *within the range* prescribed by statute." (*Apprendi v. New Jersey, supra*, 530  
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than a six-year term, which is precisely what she received. To be sure, she was not *entitled* to the midterm. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.)

The only notable difference between the Washington and California systems, as is pertinent here, is California's provision that the middle term be imposed unless the trial court makes findings supporting either the upper or lower terms. However, should this small difference mean that Washington's standard range system does not impact the right to a jury determination of a fact increasing punishment, but California's tripartite system does, or that judicial factfinding in the context of indeterminate sentencing is all right, but it is not in the context of determinate sentencing? We think not. Moreover, unlike the exceptional sentencing scheme found wanting in *Blakely*, under our system the midterm *results* from the trial court, in the exercise of its discretion, finding no mitigating or aggravating circumstances -- the trial court is not mandated to *begin* with the midterm and work its way up to the upper term. (*People v. Thornton* (1985) 167 Cal.App.3d 72, 76-77; *People v. Meyers* (1983) 148 Cal.App.3d 699, 703.) A trial judge may impose the midterm even after a finding that the aggravating circumstances outweigh those in mitigation.

In *In re Varnell* (2003) 30 Cal.4th 1132, 1141-1142, the California Supreme Court held that the statutory maximum, i.e., the sentence the trial court could not exceed without a finding by a jury or an admission by the defendant, for *Apprendi* purposes, was the upper term. Since *Blakely* is nothing other than an application of *Apprendi* to

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U.S. at p. 481 [120 S.Ct. at p. 2358], italics original.)

sentencing (*Blakely, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2536]), the statutory maximum for *Blakely* purposes is the upper term.

We conclude that the trial court did not run afoul of *Blakely* by imposing the upper term without a jury's determination that aggravating circumstances justifying that term existed.<sup>14</sup>

We also do not agree with Jackson that *Blakely* prohibits the imposition of consecutive terms absent findings by a jury, beyond a reasonable doubt, of the existence of reasons. (See *United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *United States v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *United States v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *United States v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *United States v. Chorin* (3rd Cir. 2003) 322 F.3d 274, 278-279 [358 U.S.App.D.C. 1]; *United States v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. White* (2nd Cir. 2001) 240 F.3d 127, 136; *United States v. Henderson* (S.D.W.Va. 2000) 105 F. Supp. 2d 523, 536-537; *People v. Clifton* (2003) 342 Ill.App.3d 696 [277 Ill.Dec. 219, 795 N.E.2d 887, 902]; *People v. Carney* (2001) 196 Ill.2d 518 [256 Ill.Dec. 895, 752 N.E.2d 1137, 1144-1145]; *People v. Wagener* (2001) 196 Ill.2d 269 [256 Ill. Dec. 550, 752 N.E.2d 430, 441]; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231 [132 Cal.Rptr.2d 744].)<sup>15</sup> *Blakely* involved a single

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<sup>14</sup> We note that this issue is currently pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S126182, among others.

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conviction and its holding has already been discussed. There is no presumption in California favoring concurrent sentences. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) We reject Jackson's contention that a consecutive term is akin to the exceptional sentence in *Blakely*. This trial court's decision to impose consecutive, rather than concurrent, terms is similar to its discretion to stay punishment under Penal Code section 654, which does not implicate the right to jury trial under *Apprendi*. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 270.) One who commits multiple crimes, especially, as here, against multiple victims, is not entitled to concurrent sentences. The consecutive terms imposed here were well within the statutory range prescribed, and were, in fact, less than the midterm for each offense.

#### DISPOSITION

The trial court is directed to amend the determinate abstract of judgment to state, in section 6, that the total determinate term is eight years eight months. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

KING

J.

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<sup>15</sup> Again, we note that this issue is pending before the California Supreme Court in *People v. Ochoa*, review granted November 17, 2004, S128417, among others.